BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY CABLE Claimant	)	
VS.	)	Docket No. 1,027,595
CENTURY CONCRETE, INC. Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 19, 2007, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant's present symptoms and need for medical treatment relate to a subsequent injury that did not arise out of or in the course of his employment with respondent. Accordingly, claimant's request for additional medical and temporary total benefits was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 17, 2007, Preliminary Hearing and the exhibits, and the transcript of the February 28, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues that his present back condition arose out of and in the course of his employment with respondent and is related to his accident of February 9, 2006. Claimant further contends that even if there is a sound basis to find he had an intervening injury, benefits should have been awarded because his prior injury had not fully healed and was progressively worsening. Claimant argues that because his current symptoms are a natural consequence of his original injury, benefits should have been awarded.

Respondent admits claimant suffered a compensable work-related accident and injury on February 9, 2006. However, respondent contends claimant subsequently sustained an intervening non work-related accident at home on August 2, 2007. Respondent argues the Board lacks jurisdiction for this appeal from a preliminary hearing order denying medical and temporary total disability benefits because it does not give rise to one of the issues set out in K.S.A. 44-534a. In the event the Board finds it has jurisdiction for the issues in this appeal, respondent requests that relief be denied because claimant failed to link his August 2, 2007, injury to his work injury of February 9, 2006. Respondent asserts that claimant's need for additional medical and temporary total benefits was the result of a non work-related injury that occurred at claimant's home.

The issues for the Board's review are:

(1) Does the Board have jurisdiction of the issues in this appeal?

(2) Do claimant's current symptoms and need for medical treatment arise out of and in the course of his employment with respondent, or did claimant suffer an intervening injury which relieves respondent of liability for preliminary benefits?

FINDINGS OF FACT

Claimant is employed by respondent as a truck driver. On February 9, 2006, he was involved in a serious rollover accident in which he sustained multiple injuries that included a crushed left leg, broken ribs, cracked vertebrae in his lower spine, burns on his face and back, bleeding in his brain, and crushed muscle in his upper left arm. He had surgery on his neck, his low back, his left leg and his left shoulder. The operation on his low back involved the removal of a seroma that had developed. Claimant was released to light duty work in August 2006, taking time off for surgeries in September 2006 and again in December 2006. He was released from medical care and to return to driving a truck in February 2007. He was still having low back problems and described a dull, aching pain in his low back when he sat for any length of time. That pain slowly got worse.

On August 2, 2007, claimant got out of bed and experienced pain so severe that he collapsed on the floor. The pain was in his low back and buttocks and went down his right leg. He was taken to the hospital emergency room and was admitted to the hospital. He was in the hospital five days. He had not experienced pain going down his right leg before, although he did have pain in his left leg, low back, and buttocks, as well as weakness and reduced range of motion, before the August 2, 2007, incident.

Claimant said that in addition to driving his truck at work, he has to climb up and down the ladder on the back of the truck to check his loads. He has three chutes that weigh about 50 to 60 pounds that have to be taken off, washed, and hung back on the truck after he makes a delivery. Claimant did not have any accidents or falls after he returned to work and before the incident of August 2, 2007. Other than the slow worsening

of his low back pain, nothing happened that led to his extreme pain on August 2, 2007. He has not been able to work since the incident of August 2, 2007. He currently walks with the aid of crutches.

After respondent denied claimant's request for additional medical treatment, claimant continued to seek treatment from Dr. Ellis Berkowitz on his own. Dr. Berkowitz has taken him off work as of August 2, 2007, due to right hip and leg radicular pain.

Claimant had been seen on April 18, 2007, by Dr. P. Brent Koprivica at the request of claimant's attorney for purposes of rating his functional disability. In taking claimant's medical history concerning the February 9, 2006, accident, Dr. Koprivica noted that, among other injuries, claimant had a transverse process fracture in the lumbar area. Dr. Koprivica also noted that claimant had surgery on December 1, 2006, for removal of a seroma from the lumbar area. Claimant complained to Dr. Koprivica that he had ongoing intermittent low back pain that worsened with captive sitting. The pain was relieved with standing and walking. Dr. Koprivica diagnosed claimant with chronic mechanical back pain with loss of motion as a residual of his injury in February 2006. Dr. Koprivica also noted that claimant has a limp and antalgia on the left, which he considered to be permanent.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such

> preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[1] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[2]

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) states: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[3]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

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[1] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[2] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[3] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[4] K.S.A. 2006 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[7], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[8], the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[6] *Id.* at 278.

[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[8] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

In *Gillig*[9], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[10], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[11]

But in *Logsdon*,[12] the Court of Appeals found that an aggravation in 2004 of a 1993 shoulder injury was compensable as a natural consequence of the original injury because claimant had remained symptomatic and the prior injury had never fully healed.

> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.[13]

"A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition."[14]

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[9] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[10] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[11] *Id.* at 728.

[12] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006); see also *Nance v. Harvey Co.*, 263 Kan. 542, 952 P.2d 411 (1997).

[13] *Logston*, 35 Kan. App. 2d 79, Syl. ¶¶ 2, 3.

[14] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 2, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[16]

ANALYSIS

Whether claimant's current condition and need for medical treatment is due to the work-related accident gives rise to the jurisdictional issue of whether claimant's current injury arose out of and in the course of his employment with respondent. Furthermore, whether the incident on August 2, 2007, constituted an intervening accident that relieves respondent of liability is a defense that likewise is one of the issues listed as jurisdictional under K.S.A. 44-534a(a)(2).

Claimant testified that his low back symptoms never resolved after his accident of February 9, 2006. However, following the incident on August 2, 2007, claimant had a new symptom of right leg pain. There is no expert medical opinion that specifically relates claimant's current condition to his accident at work. Conversely, there is no expert medical opinion that states claimant's aggravation at home on August 2, 2007, was a new and separate intervening injury.

Claimant has proven he sustained a compensable work-related accident on February 9, 2006, whereby he suffered multiple injuries, including to his low back. He testified that his back symptoms, while more severe, are in the same area of his low back as his symptoms before August 2, 2007. But now he also has pain in his buttock and down his right leg. In his opinion, these are related to his original accident of February 9, 2006, when his truck rolled over. There is no proof to the contrary.

CONCLUSION

1. The Board has jurisdiction of the issue raised in this appeal.

2. Claimant's current condition is a natural consequence of his work-related accident of February 9, 2006.

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[15] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[16] K.S.A. 2006 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 19, 2007, is reversed and remanded to the ALJ for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this _____ day of December, 2007.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-insured Respondent
Kenneth J. Hursh, Administrative Law Judge